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Abstract

Shortly after the outbreak of the Syrian Civil War and the emergence of the so-called 'Islamic State', concerns mounted that individuals were travelling to the region to take part in the hostilities, before returning to their countries of origin having been trained to commit acts of terrorism. In response, the British Parliament enacted the Counter-Terrorism and Security Act 2015 which introduced temporary exclusion orders; a relatively unknown administrative power which temporarily bars an individual from returning to the UK, before allowing for their managed return subject to restrictions. Although this power has, to date, been scarcely utilised, the implications of the mechanism for the right to a fair trial are significant. Whilst the decision to impose the mechanism is subject to automatic judicial review, these proceedings can take place without the individual's knowledge or meaningful involvement due to the possibility of the review being heard in *ex parte* and *in camera* proceedings. Moreover, should the individual seek to challenge the Secretary of State's decisions, or any of the conditions imposed upon their return, they must wait until they have returned to the UK, where the proceedings are again likely to take place in closed conditions.

Keywords: temporary exclusion orders; counter-terrorism; administrative powers; procedural justice; extraterritoriality

Introduction

In recent years counter-terrorist administrative powers in the United Kingdom have become invaluable, albeit infrequently used, tools in the struggle against terrorism, as a means to disrupt the activities of suspected terrorists. This article examines the administration of one of the most recently introduced mechanisms of this kind - Temporary Exclusion Orders (TEOs) - from the perspective of the right to a fair trial under international human rights law (IHRL).

Amongst other things, the Counter-Terrorism and Security (CTS) Act 2015 introduced TEOs as a means to disrupt the activities of individuals suspected of travelling from the UK to Iraq and Syria to engage in terrorism.[1] These mechanisms have a twofold function: first, to temporarily prevent British

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[1] Counter-Terrorism and Security (CTS) Act 2015, Part One Chapter Two.

citizens or individuals with the right to reside in the UK from returning to the UK; and second, to allow for the managed return of these individuals to the UK pursuant to strict conditions. Whilst this mechanism has been scarcely used to date, the implications of the mechanisms are significant, not least due to the fact that individuals can be temporarily prevented from returning to the UK in *ex parte* and *in camera* proceedings, but should they wish to challenge the imposition of the mechanism and any decision of the Secretary of State, they must first consent to the conditions determined by the Secretary before returning to the UK.

Following this introduction, the second section briefly outlines the background and statutory framework underpinning TEOs. The third section then analyses the implications of TEOs for the right to a fair trial, with the extraterritorial consequences of the mechanisms particularly in mind, before the fourth section makes some concluding remarks. Ultimately, this article attempts to shine some light on what is, relatively speaking, a fairly unknown but significant counter-terrorist tool, and in the process discuss how the mechanism may challenge the right to a fair trial under IHRL.

The Origins and Statutory Framework of Temporary Exclusion Orders

With the ongoing Syrian Civil War (2011-) and the surge of the Islamic State in the Levant (ISIL) throughout the region, concerns began to mount in 2013 that individuals were leaving their countries of origin to engage in hostilities in Iraq and Syria.[2] The UN Security Council was so alarmed by the prospect of individuals travelling to these countries that in 2014 it called upon States to 'prevent and suppress the recruiting, organizing, transporting or equipping of individuals' who travel abroad to take part in terrorist acts or acquire terrorist training amongst other things.[3] In the UK, there was increasing concern that many of these individuals were attempting to return to the country having been radicalised and trained to commit terrorist atrocities. For example, the then Home Secretary, Theresa May, said during the second reading of the Counter-Terrorism and Security Bill in the House of Commons that the UK faced 'the very serious prospect that British nationals who have fought with terrorist groups in Syria and Iraq will seek to radicalise others, or carry out attacks here'.[4] As such, the Coalition

[2] Piotr Bąkowski & Laura Puccio, '"Foreign Fighters": Member States' Responses and EU Action in an International Context', European Parliamentary Research Service (February 2015) at http://www.europarl.europa.eu/EPRS/EPRS-Briefing-548980-Foreign-fighters-FINAL.pdf.

[3] UN Security Council Resolution 2178 (2014) para 5.

[4] Theresa May, Secretary of State for the Home Department, HC Deb 2 December 2014, vol 589, col 207. See generally Edwin Bakker et al, 'Returning Jihadist Foreign Fighters' (2014) 25 *Security and Human Rights* 11; Charles Lister, 'Returning Foreign Fighters: Criminalization or Reintegration?' (Brooking Doha Center, August 2015).

Government determined that new measures were needed for managing the return of these so-called 'foreign terrorist fighters'.[5]

Temporary Exclusion Orders: Phase One

Towards the end of the Coalition Government (2010-2015), the CTS Act 2015 was enacted after being semi fast-tracked through Parliament.[6] Chapter 2 of Part 1 concerns 'Temporary Exclusion' from the UK and states:

> A 'temporary exclusion order' is an order which requires an individual not to return to the United Kingdom unless –
>
> (a) The return is in accordance with a permit to return issued by the Secretary of State before the individual began the return, or
>
> (b) The return is the result of the individual's deportation to the United Kingdom.[7]

The process by which the Secretary of State can impose a TEO is extremely similar to that of comparable counter-terrorist administrative powers, most notably control orders in the past,[8] and now terrorism prevention and investigation measures (TPIMs).[9] The Home Secretary must reasonably suspect the individual is, or has been, involved in terrorism-related activity outside of the UK;[10]

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[5] David Cameron, Prime Minister, HC Deb 1 September 2014, vol 585, cols 23-27. For analysis of this terminology, see Clive Walker, 'Foreign Terrorist Fighters and UK Counter Terrorism Laws' (2018) 2 *The Asian Yearbook of Human Rights and Humanitarian Law* 177; Clive Walker & Jessie Blackbourn, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79 MLR 840; Clive Walker, 'Foreign Terrorist Fighters and UK Counter Terrorism Laws' in David Anderson, 'The Terrorism Acts in 2015: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (December 2016).

[6] House of Lords Select Committee on the Constitution, *Counter-Terrorism and Security Bill* (2014-15, HL 92) paras 1-3.

[7] CTS Act 2015, s. 2(1). For general commentary on TEOs see Helen Fenwick, 'Terrorism Threats and Temporary Exclusion Orders: Counter-Terror Rhetoric or Reality?' (2017) 3 EHRLR 247; Helen Fenwick, 'Responding to the ISIS Threat: Extending Coercive Non-Trial-Based Measures in the Counter-Terrorism and Security Act 2015' (2016) *International Review of Law, Computers and Technology* 1.

[8] Made under the Prevention of Terrorism Act 2005. The power was revoked in 2011.

[9] Made under the Terrorism Prevention and Investigation Measures Act 2011.

[10] CTS Act 2015, s. 2(3).

reasonably consider that it is necessary to protect the public in the UK to impose a TEO;[11] reasonably consider the individual is outside of the UK;[12] be satisfied that the individual has the right of abode in the UK;[13] and have the permission of the High Court, or reasonably consider the urgency of the case requires a TEO to be imposed without prior court authorisation.[14] Only if and when an individual is served with a TEO must the Secretary inform that individual,[15] at which point the TEO comes into force.[16] Similar to TPIMs, a TEO has a maximum duration of two years unless revoked by the Secretary of State.[17] However, further TEOs can be imposed upon the same individual without any new evidence being produced.[18] In order to give effect to the temporary ban on an individual's return to the UK, when the TEO comes into force, the individual's passport is invalidated.[19]

When receiving the application from the Secretary of State, or when conducting an *ex post facto* review of the decision to urgently impose a TEO, the court must determine whether the Secretary's decisions are 'obviously flawed',[20] using the principles that are applicable in judicial review applications.[21] The court may consider it in the absence of the individual, without the individual having been informed of the application, and without the individual having been given an opportunity to address the court.[22] Finally, when a TEO is reviewed in the courts, a special advocate will represent the individual's interests; although like TPIM proceedings, no communication is allowed between the TEO subject and the special advocate once the latter has been served with the closed evidence, unless the court grants permission.[23] Finally, when issuing a judgment, a court can withhold any of its reasons if disclosure would conflict with the public interest.[24]

[11] ibid, s. 2(4).

[12] ibid, s. 2(5).

[13] ibid, s. 2(6). See also Immigration Act 1971, s. 2.

[14] ibid, s. 2(7). See also Schedule 2 to the CTS Act 2015.

[15] ibid, s. 4(1).

[16] ibid, s. 4(3)(a).

[17] ibid, s. 4(3)(b).

[18] ibid, s. 4(8).

[19] ibid, s. 4(9).

[20] ibid, s. 3(2). The court must also do this retrospectively, if a TEO is imposed urgently prior to the court granting permission. See Schedule 2 to the CTS Act 2015, para 3(2).

[21] ibid, s. 3(5). For urgent TEOs, see Schedule 2 to the CTS Act 2015, para 5(1).

[22] ibid, s. 3(3); Rule 88.21 of the Civil Procedure Rules (CPR).

[23] Schedule 3 to the CTS Act 2015, para 10(1); Rules 88.22-88.24 of the CPR.

[24] Rule 88.31 of the CPR. In these circumstances, the court must deliver a separate closed judgment to the Secretary of State and the individual's special advocate.

These provisions collectively form the foundations of what are generally labelled closed material procedures (CMP): the 'Kafkaesque' situation in which the individual is not fully informed of the charges, is not allowed to participate in trial in any meaningful sense, and is not permitted any contact with their special advocate once the advocate has been served with the closed evidence.[25] The introduction and creeping normalisation of CMP in UK domestic proceedings has been heavily scrutinised in recent years,[26] not least of all due to the perceived detrimental impact upon the principles of open and natural justice.

Temporary Exclusion Orders: Phase Two

The TEO regime is, however, not merely concerned with the exclusion of individuals from the UK. Rather, sections 5 to 9 of the CTS Act 2015 deal with the management of their return to the UK. In accordance with a 'permit to return', certain obligations may be imposed as a precondition before allowing an individual to return. According to the Act:

> (1) A 'permit to return' is a document giving an individual (who is subject to a temporary exclusion order) permission to return to the United Kingdom.
>
> (2) The permission may be made subject to a requirement that the individual comply with conditions specified in the permit to return.
>
> (3) The individual's failure to comply with a specified condition has the effect of invalidating the permit to return.[27]

Furthermore, the permit to return must specify the time, manner and place of return,[28] which may include a specific route, mode of transport, carrier or service.[29] The Secretary of State *must* issue

[25] The Joint Committee on Human Rights (JCHR) described this practice 'as "Kafkaesque" or like the Star Chamber'. See JCHR, *Counter–Terrorism Policy and Human Rights: 28 Days, Intercept and Post–Charge Questioning* (2006-07, HL 157, HC 394) para 210.

[26] See for example, John Jackson, 'The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition' (2016) 20 *International Journal of Evidence and Proof* 343; Eva Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source' (2015) 78 MLR 913; Amnesty International, 'Left in the Dark, the Use of Secret Evidence in the United Kingdom' (Amnesty International Publications, 2012); Eric Metcalfe, 'Secret Evidence' (JUSTICE, 2009).

[27] CTS Act 2015, ss. 5(1)-5(3).

[28] ibid, s. 5(4).

[29] ibid, ss. 5(5)-5(6).

a permit to return if either the individual applies (and attends an interview with a constable or immigration officer if requested) or if the individual is to be deported to the UK.[30]

Once the individual has returned to the UK the Secretary (invariably the Secretary of State for the Home Department) may impose a number of conditions upon the individual. These are limited to three types of obligations, two of which are adopted directly from the now familiar TPIM regime. Firstly, an individual may be obliged to report to a police station,[31] and secondly, to attend appointments which, according to the Act's explanatory notes, may include de-radicalisation programmes.[32] The third type of obligation that may be imposed upon an individual is that they must notify the police of their place of residence and any changes to their place of residence.[33] The Secretary can vary or revoke any of the obligations.[34]

Further controversy derives from the fact that individuals subjected to TEOs may commit an offence and be subjected to criminal sanctions in two ways. First, an individual 'is guilty of an offence if, without reasonable excuse, the individual returns to the United Kingdom in contravention of the restriction on return specified in the order'.[35] Second, 'an individual subject to an obligation imposed under section 9 is guilty of an offence if, without reasonable excuse, the individual does not comply with the obligation'.[36] With this latter offence, it is easy to draw parallels with the former control order regime and the current TPIM mechanism which similarly provides for criminal punishment for contravening an imposed condition. Imitating both the control order and TPIM statutory regimes, an individual who breaches any condition attached to a TEO can face a maximum of five years' imprisonment or a fine, or both.[37]

Once the individual has returned to the UK following the granting of a 'permit to return', they are then able to challenge the decisions of the Secretary of State, via judicial review, in numerous respects: whether the initial imposition of the TEO met the required conditions; the decision to impose the TEO itself; a decision that condition B continues to be met;[38] and a decision to impose any of the

[30] ibid, ss. 6-7.

[31] ibid, s. 9(2)(a)(i).

[32] ibid, s. 9(2)(a)(ii).

[33] ibid, s. 9(2)(b).

[34] ibid, s. 9(4).

[35] ibid, s. 10(1).

[36] ibid, s. 10(3).

[37] ibid, s. 10(5)(a).

[38] That is, that the Secretary 'reasonably considers that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed on the individual.' See CTS Act 2015, s. 2(4).

conditions upon the individual.[39] Replicating the initial review stage, the court must apply the principles that are applicable in judicial review applications.[40]

Just as questions over the *procedural* fairness of counter-terrorist administrative powers such as TPIMs and TEOs have intensified in recent years, the *substantive* fairness of TEOs and other similar powers can also be subject to criticism. This is in part due to the onerous obligations and restrictions that can be imposed against individuals in the civil courts, but also because of the possibility of individuals being subjected to criminal sanctions for breaching these conditions.

Particularly with control orders in mind, some have suggested that the obligations and restrictions attached to the mechanisms in the earliest days of the regime were akin to, or were at times, 'far more draconian punishment than many criminal sanctions, including fines, probation, community service, and suspended sentences'.[41] That being said, the conditions that can be imposed against individuals subjected to a TEO, once they have returned to the UK, are certainly not as draconian as those that were possible under control orders or TPIMs today. Nevertheless, the possibility of barring an individual from returning to the UK, even if temporary, is undoubtedly a serious restriction of several fundamental freedoms, not least the right to respect for a private and family life under Article 8 of the European Convention on Human Rights (ECHR); a point which was even acknowledged by the Home Office.[42]

Lastly, the fact that individuals who are subject to mechanisms such as TEOs can have criminal sanctions imposed against them for breaching a condition is also questionable, given that the mechanisms are firstly imposed in the civil courts, thus denying them the additional fair trial guarantees inherent to criminal proceedings. These developments have given rise to 'parallel systems of questionable justice', in which pre-emptive and often draconian powers are placed within the civil rather than the criminal process and are asserted to be preventive rather punitive.[43]

Although the CTS Act entered into force in February 2015, it was not until 2017 when TEOs were used for the first time. A freedom of information request submitted to the Home Office in February

[39] ibid, s. 11(2).

[40] ibid, s. 11(3).

[41] Helen Fenwick & Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56 *McGill Law Journal* 863, at 878.

[42] A Memorandum prepared by the Home Office whilst the CTS Bill was progressing through Parliament acknowledged this possibility. See Home Office, 'Counter Terrorism and Security Bill, ECHR Memorandum by the Home Office' (26 November 2014) para 15.

[43] Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J. Goold & Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007).

2016 for the purposes of the research in this article was inconclusive.[44] Documents published in December 2016,[45] and again in February 2017,[46] confirmed that no TEOs had been imposed as of November 2016. However, speaking shortly after the Manchester Arena terrorist bombing in May 2017, the then Home Secretary Amber Rudd revealed that the power had been used for the first and only time,[47] whilst in January 2018 the Minister of State for Security, Ben Wallace, confirmed that the power had been used 'several times' without specifying further details.[48] Lastly, demonstrating that the power is now gradually becoming more commonplace and more integral to the UK Government's counter-terrorist strategy, the most recent statistics published in July 2018 revealed that *nine* TEOs were implemented between 1 January and 31 December 2017.[49]

The Extraterritorial Implications of Temporary Exclusion Orders

In addition to the more general, and now well-known, challenges to the right to a fair trial which are raised by the use of CMP,[50] TEOs by their very nature present further unique challenges for human rights. In fact, Helen Fenwick has argued that 'TEOs are *more* likely to create tensions with human rights norms than TPIMs'.[51] In addition, due to the nature and purpose of TEOs, the exclusion of British citizens from British territory, even if temporary, may leave the UK in a position of violating its international obligations, namely, to ensure that 'any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice'.[52]

Furthermore, the UK's former Independent Reviewer of Terrorism Legislation has warned that other States may engage in reciprocal behaviour, leading to suspected foreign terrorists being held on

[44] The request was rejected under section 22 of the Freedom of Information Act 2000 on the basis that the information was intended for future publication.

[45] Walker, 'Foreign Terrorist Fighters and UK Counter Terrorism Laws' (December 2016) (n. 5) para 20(d).

[46] HM Government, Transparency Report 2017: Disruptive and Investigatory Powers (Cm 9420, February 2017) 25.

[47] Peter Walker, 'Rudd Admits Anti-Terror Exclusion Powers Used Only Once Since 2015', *The Guardian* (29 May 2017).

[48] Ben Wallace, Minister of State for Security (10 January 2018) Written Answer No. 121325.

[49] HM Government, Transparency Report 2018: Disruptive and Investigatory Powers (Cm 9609, July 2018) 26.

[50] See n. 26 above.

[51] Helen Fenwick, 'Probing Theresa May's Response to the Recent Terror Attacks' [2017] 4 EHRLR 341, at 343 (emphasis supplied).

[52] UN Security Council Resolution 2178 (2014) para 6. See also UN Security Council Resolution 1373 (2001) para 2(e).

British territory despite the Government's desire to deport them;[53] a point which has been echoed by Guy Goodwin-Gill.[54] Others have warned that TEOs may dissuade individuals from returning to the UK altogether and encourage 'the adoption of terrorism as a way of life', which might be counter-productive if individuals are further alienated and acquire greater expertise in the tactics of warfare and terror.[55]

The Implications of Temporary Exclusion Orders for the Right to a Fair Trial

Insofar as the right to a fair trial is concerned, given that an individual would, by definition, be in a foreign country when served with a TEO, ascertaining whether the UK's human rights obligations apply extra-territorially in this context is problematic. In a memorandum prepared by the Home Office on the Counter-Terrorism and Security Bill, the Home Office asserted that, as TEOs would only be imposed on subjects outside the UK, the ECHR would not be directly engaged.[56] Nevertheless, as Goodwin-Gill has argued, it is 'somewhat surprising' that the Home Office has suggested that a decision to exclude British citizens from the UK would not directly engage their rights under the ECHR.[57] As is widely known, jurisdiction for the purposes of Article 1 of the ECHR is primarily territorial,[58] but can extend

[53] JCHR, *Counter-Terrorism and Human Rights: Oral evidence* (26 November 2014, HC 836) Q 12.

[54] Guy Goodwin-Gill, '"Temporary Exclusion Orders" and their Implications for the United Kingdom's International Legal Obligations', *written evidence to the Joint Committee on Human Rights* (2 December 2014); Guy Goodwin-Gill, '"Temporary Exclusion Orders" and their Implications for the United Kingdom's International Legal Obligations, Part II', *Blog of the European Journal of International Law* (9 December 2014) at http://www.ejiltalk.org/temporary-exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-ii/.

[55] Walker & Blackbourn (n. 5 above) 852.

[56] See n. 42 above, para 10. However, as already explained, the Memorandum acknowledged that a TEO may involve a 'temporary interference with the individual's ability to enjoy his or her family and private life in the UK' and the lives of an individual's family and other social contacts (para 15). Thus, the mechanisms have the potential to engage Article 8 of the ECHR.

[57] Guy Goodwin-Gill, '"Temporary Exclusion Orders" and their Implications for the United Kingdom's International Legal Obligations, Part I', *Blog of the European Journal of International Law* (8 December 2014) at http://www.ejiltalk.org/temporary-exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-i/.

[58] *Banković and others v. Belgium* (App. no. 52207/99) ECtHR [GC], Admissibility Decision, 12 December 2001 (2007) 44 EHRR SE5.

to instances in which a State exercises effective control or State agents exercise authority and control abroad.[59]

Furthermore, individuals subjected to TEOs may be denied recourse to judicial process for a number of reasons.[60] Firstly, given the fact that individuals may be in remote and conflict-torn areas, it may prove difficult for the Home Secretary to inform them of their status in accordance with his obligation under the CTS Act 2015.[61] Secondly, even if the individual was aware in advance that the Secretary was seeking to impose a TEO upon them, the individual would have to apply to make any representations for the purpose of the automatic judicial review process from abroad, which may well be denied in any case.[62] As a result, the ability of an individual subjected to a TEO to access a court in a practical and effective manner, which Article 6(1) of the ECHR generally guarantees for all individuals,[63] will be extremely difficult, if indeed possible at all.

Out of Country Appeals – A Useful Comparison?

As already mentioned, few TEOs have been implemented at the time of writing and there is no jurisprudence regarding TEOs to analyse. However, recent developments relating to out of country appeals and 'non-suspensive appeals', and in particular, the rights of appeal against deportation orders, may shed some light as to how the right to a fair trial for an individual subject to a TEO may operate in practice. Whilst these particular proceedings are statutory appeals, in contrast to TEO judicial review proceedings which are inherently narrower in scope, the applicability of the right to a fair trial under Article 6 in both forms of proceedings justifies some comparative analysis.

More specifically, it may be useful to consider the so-called 'deport first, appeal later' implications of section 94B of the Nationality, Immigration and Asylum Act 2002, as introduced by the Immigration Act 2014.[64] The power allows the Home Office to certify human rights claims made by

[59] See for example *Jaloud v. The Netherlands* (App. no. 47708/08) ECtHR [GC], 20 November 2014 (2015) 60 EHRR 29; *Al-Skeini and others v. UK* (App. no. 55721/07) ECtHR [GC], 7 July 2011 (2011) 53 EHRR 18; *Al-Jedda v. UK* (App. no. 27021/08) ECtHR [GC], 7 July 2011 (2011) 53 EHRR 23.

[60] JCHR, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (2014-15, HL 86, HC 859) para 3.9.

[61] CTS Act 2015, s. 4(1)-(2).

[62] ibid, s. 3(3).

[63] *Golder v. UK* (App. no. 4451/70) ECtHR, 21 February 1975 (1975) 1 EHRR 524. See also *Bellet v. France* (App. no. 23805/94) ECtHR, 4 December 1995, para 38 Series A No. 333B 41; *Cañete de Goñi v. Spain* (App. no. 55782/00) ECtHR, 15 October 2002, para 34 ECHR 2002-VIII; *Nunes Dias v. Portugal* (App. nos. 69829/01; 2672/03) ECtHR, Admissibility Decision, 10 April 2003 ECHR 2003-IV.

[64] Harriet Grant, 'UK Appeal Court Backs "Deport First, Appeal Later" Policy for Foreign Prisoners', *The Guardian* (13 October 2015).

individuals facing deportation to prevent them appealing their deportation from within the UK. In other words, individuals are forced to bring an appeal from the country they are deported to; save for individuals who can prove beforehand that they will suffer 'serious irreversible harm' if they are deported.[65]

In the leading case concerning this certification power, *R (Kiarie and Byndloss) v. Secretary of State for the Home Department*, the Court of Appeal criticised the 'serious irreversible harm' test, but did not find that the 'deport first, appeal later' provision violated the obligation to provide procedural fairness.[66] In essence, this was because the existing specialist immigration tribunal system was deemed to meet the requirements of procedural fairness under Article 8 of the ECHR. Crucially, the Court cited *R (Gudanaviciene) v. Director of Legal Aid Casework*,[67] which concerned the circumstances in which the procedural guarantees inherent in Article 8 of the ECHR required the granting of legal aid in an immigration case involving a claim based on private and/or family life. In *Gudanaviciene*, the Court considered that the procedural guarantees inherent in the right to respect for private and family life under Article 8 of the ECHR were in practice the same as the guarantees pursuant to the right to a fair trial under Article 6.[68]

In *Kiarie and Byndloss*, the appellants argued in the Court of Appeal that the 'deport first, appeal later' power deprived them of procedural fairness inherent in Article 8 for a number of reasons, each of which may be relevant to individuals subject to a TEO and who wish to challenge the Secretary of State. The appellants argued that 'out of country appeals are said to be generally less effective than in country appeals';[69] that they 'would be faced with significant practical difficulties in procuring,

[65] Home Office, Guidance on Section 94B of the Nationality, Immigration and Asylum Act 2002 (9 May 2016).

[66] *R (Kiarie and Byndloss) v. Secretary of State for the Home Department* [2015] EWCA Civ 1020. For commentary see Emma Lough & Audrey C. Mogan, 'R. (on the Application of Kiarie) v Secretary of State for the Home Department' (2016) 30(1) JIANL 59; Peter Jorro, 'The Enhanced Non-Suspensive Appeal Regime in Immigration Cases' (2016) 30(2) JIANL 111.

[67] *R (Gudanaviciene) v. Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247.

[68] ibid, para 47.

[69] *Kiarie and Byndloss* (n. 66) para 54. The appellants cited the observations made by Sedley LJ in *R (BA (Nigeria)) v. Secretary of State for the Home Department* [2009] EWCA Civ 119, [2009] QB 686, para 21, who held '…the pursuit of an appeal from outside the United Kingdom has a degree of unreality about it. Such appeals have been known to succeed, but in the rarest of cases'. The appellants also cited the observations of Collins J in *R (MK (Tunisia)) v. Secretary of State for the Home Department* [2010] EWHC 2363 (Admin), as endorsed by the Court of Appeal in *R (E (Russia))* [2012] EWCA Civ 357, [2012] 1 WLR 3198, para 43, where Sullivan LJ held '…that common sense indicates that a claimant who has to pursue an appeal while he is out of the country faces considerable disadvantages, particularly in the context of an appeal to SIAC'.

preparing and presenting evidence' for appeal;[70] that 'removal pending appeal would have a clear impact on the overall fairness of the proceedings, including the appearance of fairness';[71] and finally that 'requiring the appellant to pursue an appeal out of country would be likely to diminish his chances of success and, by parity of reasoning, to enhance the Secretary of State's prospects of successfully resisting the appeal'.[72]

Although the Court of Appeal acknowledged that an out of country appeal would be less advantageous to the appellant than an in country appeal,[73] the Court ultimately refused to accept that the appellants would be deprived of effective participation in the decision-making process and of a fair procedure. Lord Justice Richards held that:

> Article 8 does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness.[74]

Rather, Richards LJ stated that the Secretary of State was entitled to rely on the existing specialist immigration tribunal system to ensure that an appellant is given effective access to a fair appeal process.[75] On the specific difficulties which an appellant might face when appealing from abroad, Richards LJ held that the availability of modern electronic communications would not present serious obstacles to the preparation or submission of witness statements or obtaining relevant documents for appeal.[76]

Upon appeal to the Supreme Court, however, the requirement for the two individuals to appeal against their deportation from abroad *was* found to have violated the right to procedural fairness under

[70] ibid, para 55. The appellants argued that they 'would not be present in the United Kingdom to begin and pursue the process of evidence gathering, including obtaining witness statements and documentary evidence' relevant to his case, and stressed the inability to be present at the proceedings.

[71] ibid, para 57. The appellants pointed to the different positions of the parties in the sense that an appellant is out of the country, and that they are against the Secretary of State who, as the head of a well-resourced department, will be represented at the hearing by a well-trained official or counsel.

[72] ibid, para 58.

[73] ibid, para 64.

[74] ibid.

[75] ibid, para 65.

[76] ibid, para 66.

Article 8 of the ECHR.[77] Delivering the leading opinion, Lord Wilson JSC held that the men and their lawyers would face practical difficulties communicating before and during their appeal,[78] and that for an effective appeal the appellants would need to be able to present live evidence as to their family ties and their reformed characters.[79] In that respect, Lord Wilson JSC stressed that the financial and logistical barriers to giving evidence on screen are 'almost insurmountable',[80] which was particularly highlighted by the acknowledgement of academic research that 66% of First-tier Tribunal judges considered IT equipment in court to be poor.[81]

The implications of *Kiarie and Byndloss* can, however, be contrasted with another recent case which concerned the deprivation of citizenship and the barring of an individual from returning to the UK for national security reasons. In *K2 v. UK*, similar challenges were made in respect of the procedural fairness under Article 8 of requiring an individual to mount a challenge from abroad.[82] Such an appeal is made possible, after an individual has had their citizenship revoked, pursuant to the British Nationality Act 1981, or the Special Immigration Appeals Commission Act 1997, in situations where the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public.[83]

In this case however, the European Court of Human Rights rejected the argument that the individual's right to procedural fairness had been violated. This was because Article 8 could not be 'interpreted so as to impose a positive obligation on Contracting States to facilitate the return of every person deprived of citizenship while outside the jurisdiction in order to pursue an appeal against that decision'.[84] Furthermore, of particular relevance to the nature and purpose of TEOs, the Court stated that it could not ignore the fact that K2 had chosen to leave the UK voluntarily which was the reason why the appeal had to be conducted from abroad.[85]

Clearly, the TEO regime replicates many of the features of control orders and TPIMs, which will inevitably lead to similar issues being raised about the substantive and procedural fairness of the new

[77] *R (Kiarie and Byndloss) v. Secretary of State for the Home Department* [2017] UKSC 42. For commentary see Audrey C. Mogan, 'R (on the application of Kiarie) v The Secretary of State for the Home Department' (2017) 31(3) JIANL 263.

[78] ibid, para 60.

[79] ibid, paras 55 & 61.

[80] ibid, para 76.

[81] ibid, para 68.

[82] *K2 v. UK* (App. no. 42387/13) ECtHR, Admissibility Decision, 9 March 2017 (2017) 64 EHRR SE18.

[83] British Nationality Act 1981, s. 40A; Special Immigration Appeals Commission Act 1997, s. 2B.

[84] *K2 v. UK* (n. 82) para 57.

[85] ibid, para 60.

mechanism. However, as discussed in this section, TEOs will present unique challenges to the right to a fair trial, the effects of which are not yet clearly known. Whilst the UK domestic courts have not looked favourably upon the notion of proceedings where the concerned individual is abroad, as demonstrated in *Kiarie and Byndloss*, the European Court in contrast appears to be more sympathetic to the State, especially in circumstances involving national security concerns.

Conclusion

It remains to be seen if TEOs will become more widely used by the UK Government as a means to disrupt the activities of suspected foreign terrorist fighters, or if the power will eventually be challenged in court. They are nonetheless a significant counter-terrorist power within the Home Secretary's armoury. There is certainly some consolation to be taken from the gradual collapse of ISIL in the Middle East, whose activities were the prime motivating factor for the creation of TEOs, as well as what appears to be a gradual cessation in hostilities in the Syrian Civil War, albeit one still plagued by accusations of war crimes. As such, the discussion in this article will remain more theoretical than practical, unless a legal challenge is brought to the courts. Nevertheless, the recent experience of non-suspensive appeals in 'deport first, appeal later' cases demonstrates to some extent that securing procedural justice for individuals abroad may be extremely challenging. Moreover, once the individual returns to the UK, should they wish to challenge the decisions of the Home Secretary, they are then once again confronted with the challenges which are inherent to *ex parte* and *ex parte* proceedings.